1966

Hoggan & Hall & Higgins, Inc., A Corporation v. Nelson W. Hall and Raymond C. Higgins : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

HOGGAN & HALL & HIGGINS, INC., a corporation,
Plaintiff and Respondent,

vs.

NELSON W. HALL and RAYMOND C. HIGGINS,
Defendants and Appellants.

Case No. 10453

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Parley E. Norseth, Judge

HANSON & GARRETT
520 Continental Bank Building
Salt Lake City, Utah
Attorneys for
Plaintiff and Respondent

DRAPER, SANDACK & SAPERSTEIN
606 El Paso Natural Gas Building
Salt Lake City, Utah
Attorneys for
Defendants and Appellants

INDEX

AUTHORITIES CITED

TEXTS

Page

CASES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

HOGGAN & HALL & HIGGINS, INC., a corporation,
Plaintiff and Respondent,

vs.

NELSON W. HALL and RAYMOND C. HIGGINS,
Defendants and Appellants.

Case No. 10453

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This action was instituted by plaintiff, a Utah corporation, engaged in the advertising business against the individual defendants who are stockholders of plaintiff corporation and were prior to March 1, 1964 officers and directors of plaintiff corporation, for (1) Injunctive relief to restrain defendant from soliciting the company advertising accounts, (2) For damages in the amount of $75,000.00, (3) The return of plaintiff's files and records removed by defendants, (4) $500.00 owed by defendant Hall to plaintiff, and (5) Return of the company Plymouth automobile in the possession of defendant Hall or the value.

DISPOSITION IN LOWER COURT

At the time this law suit was commenced on March 11, 1964 for the relief set forth above, plaintiff also moved the Court for a preliminary injunction to (a) Restrain defendants from further solicitation of plaintiff's advertising customers, (b) To return all advertising data, material, and files removed from the premises of plaintiff, (c) From copying or in any manner using any information contained in said advertising data, materials, and files, and (d) To compel defendant, Nelson W. Hall, to return a 1963 Plymouth automobile.

On March 20 through March 23, 1964 a hearing was held in the District Court of Salt Lake County before the Honorable Stewart M. Hanson on plaintiff's Motion for a Preliminary Injunction. After extensive testimony on the matter, an injunction was entered by the Court restraining defendants from the further solicitation of plaintiff's customers and commanding defendants to return the files and records removed from the offices of plaintiff, except such material that as in the custom of the trade, was the property of the client and ordering the defendants not to use certain of the material which was developed while defendants were in the employ of plaintiff. Defendant Hall had returned the Plymouth automobile prior to the hearing on plaintiff's Motion for a Preliminary Injunction and this item was abandoned at the time of hearing.

The action was tried before Judge Parley E.

Norseth of the Second Judicial District in Salt Lake County, Utah on January 21 and 22, 1965. After the submission of Briefs, the Court entered a Judgment in favor of the plaintiff and against defendants in the amount of $25,000.00.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Judgment in their favor, no cause of action, as a matter of law; or that failing, reversal of the Judgment and Judgment in favor of the plaintiff, but for nominal damages only; or that failing, a new trial.

STATEMENT OF FACTS

The facts as stated by appellants in their Brief are as they contend them to be and not as they must be stated on appeal, favorable to the Judgment of the lower court, hence a further statement is necessary in this Brief, even though there will be some repetition.

Plaintiff corporation is engaged in the advertising business in Salt Lake City, Utah.

Generally an advertising agency and also this plaintiff prepares advertising copy, distinctive slogans, art work, and layouts for its customers and places this advertising with the media such as newspapers, radio and television. The advertising agency is billed by the media and in turn bills its clients. For the most part, its income is derived on the basis of 15 per cent of the dollar volume of advertising placed with the media (Ex. 15p sets forth

the agency procedure of the plaintiff corporation in detail.).

The plaintiff corporation was incorporated on March 1, 1960 and at the time of the trial of this action, the stock in the corporation was owned as follows:

E. D. Hoggan — 17,249 shares
Nelson W. Hall — 5,246 shares
Raymond C. Higgins — 1,000 shares

Qualifying shares were also owned by the wives of Mr. Hoggan and Mr. Hall. Mr. Hoggan, Mr. Hall and Mr. Higgins were each officers and directors of the plaintiff corporation. Mr. Higgins joined the corporation as a stockholder, officer, and director in September, 1963 or approximately 6 months before the events giving rise to this law suit (R. 229-230).

Before incorporation in March, 1960, this advertising agency had been conducted under the partnership style and was composed of Mr. Hoggan and Mr. Hall and a Mr. Parkin. Mr. Parkin had no interest in the company at the time the law suit was commenced.

At the end of 1963, the Boise Cascade Company, a large lumber manufacturer and distributor, had elected to place all of its advertising with its agency in Boise, Idaho. It withdrew its patronage from the plaintiff corporation. The Boise Cascade account was a major revenue producer for the corporation

and Mr. E. D. Hoggan devoted approximately 75 per cent of his time to the advertising business of that account.

After the first of the year (1964), Mr. Hall and Mr. Higgins became dissatisfied because the corporation showed a small loss in January (the profit and loss statement for February had not been prepared when the events giving rise to this law suit occurred).

As a result of this dissatisfaction, Mr. Higgins called for a meeting of the three principals (Hoggan, Hall & Higgins) to discuss agency affairs. The importance of the meetings of February 14, through February 18, 1964 between these principals cannot be underestimated and the discussion and results are now set forth in detail.

Following is the testimony of Mr. Hoggan:

"A. I recall a meeting. My recollection it was February 14th. A Friday evening.

"Q. A Friday evening, February 14th?

"A. Yes.

"Q. Do you keep a journal, Mr. Hoggan?

"A. I do.

"Q. And did you make notes concerning that meeting?

"A. I did.

"Q. Now will you tell us your recollection as to what was said by the three who attended that meeting?

"A. In the afternoon of the 14th Mr. Higgins asked if he and Mr. Hall might have a meeting with me immediately following work, and I said yes. We left the office around 5:00 o'clock and went up to Mr. Hall's apartment, which was above the corporation office on 5th East. Mr. Higgins — I think, if I remember correctly — broached the subject that the corporation had been losing money during January, and it looked like we would face an equally heavy loss in February. I said I was very well aware of it, because I had worked on it with the accountant and the bookkeeper in regard to both months.

"Q. What did that loss appear to be?

"A. It at that time was between $1,500.00 and $1,800.00 a month.

"Q. What else was discussed between you?

"A. Mr. Higgins said he was quite seriously worried and I said: 'I see no great cause for alarm. This is our slow period of the year. It invariably has been for years.' On general accounts the fall and winter season are usually slow. From November through March.

"Q. Has this been your past experience in the advertising business?

"A. That is correct. We have always had a slump and faced a serious loss the first quarter of the year, so I said: 'I have no immediate worry, although we will have to do something about it. We are adequately financed, and we can exist for awhile without anything serious happening. In the meantime we will solicit accounts.' I said: 'I already

have several good prospects.' He said 'I acknowledge that, but prospects do not produce money. Would you be willing to take a cut in salary?', and I said: 'If you are talking about an equal cut, yes.' I said: 'I have already taken one cut, to reduce my salary down to the level of yours and Nels', but if you wish it I will take another cut, providing it's equal, down to $800.00 or $750.00 a month,' and Ray said: 'What else do we have to explore? Shall we reduce personnel?,' and I said: 'I'm perfectly willing to let two of the girls go. One or two.' He said: 'How about Mrs. Hoopes? Shall we let her go, and you may service her accounts?', and I said: 'Mrs. Hoopes is a very capable employee of the firm. One of the most talented and versatile people I have met in the advertising field. I wouldn't consider that. The other two girls, yes. But not Mrs. Hoopes. We will have to have people of her caliber here.' Then he said: 'You won't consider a cut in salary?' and I said: 'I will go along with whatever cut you and Nels propose.' He said: 'No. I mean you take the cut in salary,' and I said: 'What are you thinking about?' He said: 'You take no salary, as far as I'm concerned, until you're producing again,' and I said: 'Ray, I have the biggest investment in this thing. This represents my lifetime savings. This is here for one definite purpose, and that's to tide us over a tough period. I invested it only for that reason. To operate a corporation, and make a living out of it.' I said: 'I'm entitled to something for that,' and he said: 'For my money you're entitled to nothing.' He said: 'You're not producing, and consequently you deserve no money.' I

said: 'Do you feel the same way about it, Nels?', and he said he refused to take a cut in salary.

"Then we discussed at some length the idea of what corporate reserves are for. I said: 'In years past, Ray, every account executive ever employed has lost accounts and never been penalized by cuts in salary. I don't know why I should be at this time,' and Nels said: 'Well, how long do you propose to draw this salary?' I said: 'Well, theoretically, Nels, I could draw it until the corporation's reserves are entirely exhausted and we go down the drain. In practicality, I have no intentions to do so. I think we can have this thing back on its feet within three to six months' time' and Ray said he didn't propose to stay around and watch us lose money, he didn't propose to stay around and see the firm go bankrupt, and I said: 'I think you're making a foolish mistake, because the three of us together are much stronger than we are individually.'

"That was my reply to them, to stay, and Ray said: 'No, I have had enough. I'm leaving. What about my accounts?', and I said: 'Your accounts you brought in here, Ray, legally the firm may have some claim on them. Morally I don't think we have any claim at all, so I'll release your accounts.' He said: 'What about my furniture?,' and I said: 'Well, you turn back your stock on behalf of the corporation, and I'll release your furniture and call it quits. Let's part as easily as we can, with a minimum of friction, and you can be on your way.'

"THE COURT: Was that with Mr. Higgins?

"THE WITNESS: Mr. Higgins, yes.

"THE COURT: Thank you.

"THE WITNESS: I said this to Mr. Higgins.

"Q. Mr. Hoggan, you previously have been sworn as a witness in this case. When we finished last night the last part of your testimony had to do with the conversation on the 14th of February, and you were discussing and relating what was said by you to Mr. Higgins concerning his accounts, where you indicated that you had perhaps a legal claim but no moral claim on them. Will you continue from there, please?

"A. Well, we continued the conversation on this vein. I was attempting to explain the financial stability of the organization, the fact that the reserves were accumulated to tide us over such emergencies, that previously account executives had lost accounts without being penalized, and that I saw no reason why they should demand this from me, a complete lack of salary, during this period. I said I had made the big investment in the corporation, and my investment had carried it through a lot of rough times in years past.

"Ray then stated that he saw no need for money. He said perhaps he had been fortunate in his operation, but he saw no need for a tremendous amount of capital, and I said: 'It's always been our experience that we are faced with a great many accounts receivable continuously.' I pointed out that several of

Mr. Hall's accounts were in arrears four and five months, for several thousand dollars, and that it was necessary that we carry at least part of this continuously. That we were up against a payroll and fixed expenses in overhead every month. Regardless of whether the accounts paid us or not, those salaries had been paid in the past.

"Ray still insisted that there be no salary drawn on my part, and I said: 'In that case, Ray, evidently we can't reach an agreement on this thing. You are not being penalized on this. The great loss to the company is coming from my investment, which is 75%, Mr. Hall has taken 20%, and you are accepting 5% of every dollar lost. This is not very great odds on your part.'

"Ray said regardless of that he didn't want to stay around while the corporation lost money, and I said: 'Then there's only one thing to do. I suppose you want out?' He said: 'I do,' and I said: 'Then we can negotiate to release your furniture and fixtures. You will turn back in your stock, and let's separate as amicably as possible.' He said: 'What about Mr. Hall? He may want to leave too. What about his account?', and I said: 'Mr. Hall has no accounts, Ray. The accounts belong to the corporation. They were largely sold by me, my investment has financed them and I have assisted in their servicing. They were all done with the intent that this is corporation, and that you can't separate the affairs of one person from another. They're not Mr. Hall's accounts. I stand on that.'

"Ray then said he had a dinner engage-

ment — it was then nearly 8:00 o'clock, we had been three hours in session — and I said: 'Well, I would like to stay and talk with Mr. Hall.' He said: 'It looks like we have finished our affairs, and the argument now is between you and Mr. Hall.' I said it was no argument. I merely wanted to stay and talk with Mr. Hall, and get a few other things straightened out. He excused himself in the neighborhood of a quarter to 8:00 o'clock, and I stayed and talked with Mr. Hall.

"The jist of the conversation was that I asked, I said: 'You understand what I'm getting at, Nels, in relation to this financial situation?' He said: 'I do perfectly. But Ray,' Mr. Higgins: 'does not. He says every time you mention financing he gets mad, because he doesn't understand it.' 'Well,' I said: 'that being the case, he evidently [doesn't] belong in agency management. If he cannot appreciate profit and loss, depreciation, and all these other factors.' 'Well, he said: 'you have got to give him his own way, or the whole thing will crash down.' I said: 'Nels, in all conscience I can't give him his own way. If I step down now, and turn over the management of this corporation to Ray, then I'm finished. I have had it completely. I don't propose to do that. There is nothing legally or morally that can force me to do it.' I said: 'I intend upon remaining as manager of this corporation, and as such I will continue to draw a salary.' I said: 'I don't understand your feeling in this regard, because I think you will admit that I have always treated you fairly and honestly in all of our transactions.'

"He admitted that I had, the conversation was continued for a short time longer, and the telephone rang. I was close to it and I answered it. Mr. Higgins was on the phone, and he asked to speak to Mr. Hall. Then Mr. Hall said: 'You'll have to excuse me. We have a dinner date with Mr. and Mrs. Higgins.' So I excused myself at that time and left. That was still on the evening of the 14th of February.

"Q. All right. Did you have a further conversation with Mr. Hall the following day?

"A. The following day was Saturday. I came down to work at about 9:30. My wife dropped me off at the office and went downtown. I was there for approximately an hour, the telephone rang, and it was a personal call for Mr. Hall. He had an extension telephone from the main telephone in the office and I transferred it upstairs, and after the light had gone off on the phone I dialed Mr. Hall and asked if he would like to talk. He said he had just gotten out of bed and he couldn't come down, but if I would come up he would be glad to make me a cup of coffee.

"Q. Did you have a conversation with him at that place and at that time?

"A. Yes. I went up to his apartment, and I tried to talk. Nels was quite non-communicative. I asked him if he'd made up his mind what he was going to do, and he said he had not. That was the sum and substance of that conversation.

"Q. All right. Now did you have a further conversation with Mr. Higgins and Mr.

Hall subsequent to that Saturday, concerning the affairs of the corporation?

"A. Nothing on Monday. I was in Ogden on a business call, a prospect, and returned at 1:30. There was nothing said there. On Monday. On Tuesday Mrs. Hoopes, Mr. Parkin and I went out to the south area of the County on another prospect call, and we returned about 11:00. I would say somewhere around 3:00 in the afternoon Mr. Higgins asked me if we could have another meeting.

"Q. What day was this again?

"A. That was on Tuesday. That would be the 18th.

"Q. All right. And did you have a meeting that evening?

A. We had a meeting that evening.

"Q. Who was present besides the three of you?

"A. At 5:00 o'clock. Mr. Hall, Mr. Higgins and myself.

"Q. All right. What was discussed at that time?

"A. It was a very short meeting. Mr. Higgins announced that Mr. Hall was leaving. I expressed my regrets, and I said: "What about the accounts?' He said: 'We have those all locked in."

"Q. Who said that?

"A. Mr. Higgins. And I said: 'Is this true, Nels?' He said: 'Yes, we have the business.'

"Q. What else was said?

"A. I said: 'When did you do this? When did you make up your mind?' He said: 'I talked to you Saturday. Subsequent to Saturday.' I said: 'What have you been doing?' and he said: 'We have been out getting these accounts lined up.' I said: 'Well, I can't believe it. I can't believe that you'd be that shortsighted and stupid.' He said: 'What is wrong with that?' I said: 'Well, you're conspiring to destroy your own corporation for one thing. You're soliciting the accounts of the business,' and I said: 'I take a very very dim view of this thing.'

"Then Mr. Higgins said: 'Why don't you face it, Ned? You have had it.' He said: 'We have all the business, and all you have left is this bunch of old furniture downstairs and some money in the bank.' He said: 'Why don't you be a good guy, and buy Nels out and release him? We'll be on our way, and we'll bear you no hard feelings at all.' I said: 'That is very generous of you. I'm not in any position to buy Nels out. I don't intend to go out of business, nor do I intend to dissolve the corporation. It would take a great many months to collect all of our accounts receivable and dispose of the other assets, and I don't propose to do this.' He said: 'Well, you won't give us an answer now?' I said: 'Of course I won't give you an answer now. You have evidently taken some time in making up your mind as to what you were going to do, and I'm going to ask the same consideration . . .' (R-233-242)."

The testimony of Mr. Hall and Mr. Higgins concerning the meetings does not vary materially

from the testimony of Mr. Hoggan which has been quoted extensively above. Neither of the defendants deny that they had informed Mr. Hogan that they had the accounts and Mr. Hall testified:

> "Q. Did you make a statement — specifically, or in substance — that you had the accounts, and were taking them with you?
>
> "A. In substance, that I knew accounts were coming with me.
>
> "Q. As a matter of fact, Mr. Hall, by that time you had agreements with these people? By that I mean their assent to go with you? Is that correct?
>
> "A. I had an understanding that some were coming with me, yes." (R. 132)

Mr. Hall contacted five of the six accounts on Monday, February 17, 1964. It will be noted that at this time, Mr. Hall had not advised anyone of his decision to leave the corporation and, in fact, had informed Mr. Hoggan that he did not know what he would do. Only after he had obtained assurances that the accounts he had been servicing would go with him when he left the plaintiff corporation, did he announce that he had been contacting the accounts and that he intended to leave the plaintiff corporation.

Obviously his decision to leave the plaintiff was prompted by his good fortune in having obtained the advertising business of these accounts. Thus emboldened he announced to Mr. Hoggan that he was

leaving and taking the business with him (R. 131-132.)

Although Mr. Hall throughout the course of the proceedings in this law suit has consistently attempted to cast the impression that he did not solicit and ask for the advertising business that he took with him, his own testimony and the testimony of those he solicited points unerringly to the conclusion that on Monday the 17th day of February, 1964, Mr. Hall contacted five of the six accounts he had been servicing for the purpose of obtaining their business.

Most important is the testimony of Mr. Hall in regard to the solicitation of the Salt Lake Mattress Company. Mr. Hall testified:

> "Q. Will you relate your conversation — at the time that you contacted Mr. Eberhardt, of Salt Lake Mattress Company — wherein you advised him that you were leaving the plaintiff corporation?
>
> "A. This was substantially the same conversation that I had had with the previous accounts. Outlining the difficulties at the agency. The loss that had been incurred. The fact that Mr. Higgins was leaving. That Mr. Hoggan had no accounts. That we were in a serious position, and that I was leaving. Then I asked Mr. Eberhardt if he would like me to continue to service his account. Now do you want Mr. Eberhardt's reply?"

Mr. James Eberhardt, co-owner of Salt Lake

Mattress whose account had been serviced by several advertising men employed by plaintiff over a six-year period including Mr. Hall, testified to the meeting with Mr. Hall as follows:

> "Q. Tell us what was said by each of you at that time.
>
> "A. Mr. Hall said that Mr. Hoggan had lost his big account, and was drawing on the agency. That he and Mr. Higgins were carrying the load, in essence, and that he was breaking away from Mr. Hoggan and the agency that was set up, and wanted to know if we'd go along with the proposition. At the same time he also stated that most of the accounts he had contacted were going along with him. That in essence is what he said." (R. 183)

We may correctly distill from this testimony and particularly that of Mr. Hall that he had the same conversation with each of the accounts he contacted and asked each of them for their advertising business.

Also Mr. Hall testified that before he left the agency at the end of February, 1964, the accounts he had contacted had "agreed" that he could continue to service the accounts (R. 135).

Of further importance to the evidence in this case concerning the scheme of solicitation practiced by defendants is the testimony of those solicited.

Mr. Charles Freed testified:

"A. Well he informed me that he and Ned Hoggan were splitting up. They would no longer be together." (R. 280)

Mr. Allan E. Brockbank testified:

"A. Mr. Hall came to my office and told me that the organization was going to be divided and that he and Mr. Higgins were going to form a new organization." (R. 270)

Mr. Peter Wilson of Wilson Transport Supply testified:

"A. In effect he said that there was going to be a separation between he and Mr. Hoggan, and that I should make a choice as to which of the gentlemen should handle our account, or where I wanted to place the advertising in the future." (R. 288)

Mr. Tony Hatsis testified:

"A. Mr. Hall came to me, I think it was the middle or early part of February and says that they were going to split, and he asked me what I wanted to do, and I says, 'Wherever you go, I want you to handle my advertising. You are the man that put yourself out for me. You are the man that has done all this work.' And I wanted him to continue my advertising." (R. 313)

In each instance the plain implication was made that the agency was being divided or split up. This, of course, was not true as there had never been any conversation between the officers, directors and stockholders of the corporation concerning its dis-

solution. Also the thought was implanted in the minds of the advertising accounts that the agency was in financial trouble. True it had sustained a small loss in January, but this was nothing according to Mr. Hoggan that could not be expected at that time of year or replaced by a mutual effort of the principals.

Mr. Hall and Mr. Higgins remained officers, directors, and employees of the plaintiff corporation until the last day of February, 1964. As noted above, they had obtained the advertising business of these customers of plaintiff while still employees, officers, and directors of plaintiff corporation. They discussed formation of a new organization on February 19th (R. 118). Later in February, but before they had tendered their notices of resignation, they formed a new corporation styled as Higgins & Hall and by March 1, 1964, the new agency was in business. At about this time (February 29, 1964) defendants Higgins and Hall entered the office of the plaintiff corporation and removed therefrom all of its files and records relating to the accounts that they took with them. This was one of the subjects of the hearing on preliminary injunction which occurred within a few weeks thereafter and much of this material was ordered to be returned to the plaintiff.

However, the defendant Hall was not at that time through interfering with the business of the plaintiff corporation. In the month of February,

1964 he had orally agreed on behalf of the plaintiff corporation to a 13-week extension of certain contracts at KSL-TV for advertising broadcast time. Thereafter on the 9th day of April 1964 at a time when he was no longer an employee of the plaintiff corporation, he executed on behalf of plaintiff corporation, an agreement with KSL-TV cancelling the 13-week contract on behalf of the plaintiff corporation and executing a new contract on behalf of Higgins & Hall for the balance of the 13-week period. These contracts were the property of the plaintiff corporation. They had been entered into for a period of 13 weeks with the first broadcast date February 18, 1964. They were to run thereafter for a full period of 13 weeks. Billing on these contracts would be to the agency that let the contract and in turn they would derive a commission on the placement of this advertising time. Obviously Mr. Hall found that he could not get this revenue after he left the plaintiff's employ unless and until new contracts were written. Not only did he enter into these contracts without authority on behalf of the plaintiff corporation, but in clear violation of the Court Order. (R. 177, 178 and Ex. 5-8).

Mr. Hall testified:

"Q. Were you aware that you were under a Court Order not to interfere with the contracts of the plaintiff corporation on April 9, 1964?

"A. Yes. (R. 142)

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE LOWER COURT'S FINDINGS THAT DEFENDANTS SOLICITED PLAINTIFF'S ADVERTISING CUSTOMERS INCLUDING WILSON TRANSPORT SUPPLY, BEFORE LEAVING PLAINTIFF'S EMPLOY.

Defendants argue under Point I of their brief that the evidence was not sufficient to support the Court's finding that they solicited the advertising business of plaintiff, except that they admit that they solicited the account of Wilson Transport Supply. In this regard, defendants cite the evidence of defendant Hall and the testimony of Charles Freed, Alan E. Brockbank, Tony Hatsis, and Frank Shelley.

On the contrary, while Mr. Hall's solicitations were subtle, they were nonetheless designed to take from plaintiff the advertising accounts he had been servicing while an employee of plaintiff. By deliberate mis-statement of facts and by taking full advantage of the intimate relationship he had with each of the accounts, he obtained their advertising business before he left plaintiff's employ.

There can be no doubt as to why he contacted these accounts on February 17, 1964. He made his purpose perfectly clear in his testimony.

Mr. Hall:

"Q. Is it you testimony then that the decision to contact the accounts and to secure their business was your own?

"A. Yes."

"Q. Did you also form a conscious desire to take your accounts that you had been servicing with you when you left?

"A. This would have been a natural reaction, yes. (R. 122)"

"Q. Now prior to the end of February, 1964 you considered that the business that went with you was yours, did you not?

"A. Yes (R. 143)."

There can be no question that Mr. Hall's intent was to purposely set out to divert plaintiff's business to himself. The testimony above adequately shows this purpose.

We come now to his method of executing this intended plan. In the case of Mr. Eberhardt at Salt Lake Mattress and Mr. Wilson of Wilson Transport Supply, the defendant Hall asked them for their business in so many words. This is admitted by defendants (Pre-trial Order — R. 18).

CONTENTAL REALTY (Brockbank Organizations)

In this case Mr. Hall explained to Mr. Brockbank that the plaintiff corporation had financial problems, that Mr. Higgins had announced his intention to leave, that the agency was losing money, and that he (Hall) couldn't continue in that sort of an operation and that he was leaving also.

FREED MOTOR COMPANY

Here again Mr. Hall enumerated the financial difficulties of the plaintiff corporation, it was losing money, that it would continue to lose money, that Mr. Hoggan had refused to take no salary or at least a substantial cut in salary (meeting of February 14, 1964), and that he was leaving the agency (R. 120, 121, 122). He also left the impression with Mr. Freed that he and Mr. Hoggan were splitting up (R. 177).

CLUB MANHATTAN — HOFBRAU

Mr. Hall met Mr. Hatsis as he had the others on the 17th day of February, 1964 (Hall) testified:

"Q. State what you said to Mr. Hatsis. Not relating to what he said.

"A. I told Mr. Hatsis I was leaving the organization I was with, and I asked what he would like to do. (R. 160)"

Here again a direct solicitation.

COUNTRY MUTUAL LIFE

Mr. Frank Shelley was not contacted until March 2, 1964, but here again is evidence of a direct attempt to divert the plaintiff's customers.

"Q. Relate what you said to Mr. Shelley at that time without stating what he said to you.

"A. I told Mr. Shelley I was no longer with the former organization, but I was now with a corporation known as Higgins & Hall. I gave him my address and I asked if I could continue to service his account (R. 165-166)."

Of these six accounts, five were contacted on the 17th day of February, 1964 by Mr. Hall for the purpose of obtaining their business when he left the plaintiff corporation. At that time he either directly asked for their business or conveyed to them the impression that he and Mr. Hoggan were splitting up because the corporation was beset with severe financial problems that would make it unable to continue business. Naturally no one wants to do business with a company that is going broke. An advertising agency places its advertising with the media; is billed by the media; and in turn bills its accounts. If in fact, the plaintiff corporation was in the serious financial condition that Mr. Hall described, then that account would have no choice, but to seek a new agency. Since Mr. Hall had achieved a very intimate relationship with each of these accounts, their decision to go with him was, of course, predictable. He also implied that he and Mr. Hoggan were splitting up. However, he had never been requested to leave plaintiff's employ; the decision was his own. Further the evidence does not show that plaintiff corporation was in the dire financial situation that Mr. Hall led the accounts to believe. True it had suffered a small loss in January, 1964, but there is evidence that these losses would diminish and in fact the plaintiff corporation was still in business as E. D. Hoggan & Associates at the time of the trial of this action.

As to the Allan E. Brockbank Organizations,

Mr. Hall knew or should have known that the mention of financial disaster would have the desired effect of getting the account. Mr. Brockbank testified that his account needed to be financed by the advertising agency and if it wasn't so financed, he could no longer remain with that agency (R. 275). Mr. Hall also left the impression with these accounts that they were "dividing up" the old agency. The implication was that each was taking certain accounts and going their separate ways. Here again there is no evidence of any agreement on behalf of these parties. Certainly the solicitation made by defendant Hall was done without the knowledge or consent of plaintiff.

All of the evidence of the solicitation by Hall shows that he either directly asked for the business or very subtly implied to the account that he had a right to their business because the agency was dividing up or that their account would suffer if they did not go with him because of the financial condition of the plaintiff. His purpose was clear and the execution of his plan produced the desired results.

The law does not support him in this endeavor, but rather condemns his methods and gives rise to an actionable wrong.

In Re-statement, (2d), Agency, Section 393, in (e) it is stated:

"PREPARATION FOR COMPETITION

AFTER TERMINATION OF AGENCY. After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See Section 396. Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. *He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business.*" (Emphasis supplied)

The evidence in this case shows that the defendant Hall, and on one occasion the defendant Higgins, in regard to Wilson Transport Supply, solicited the business of plaintiff's customers before they had terminated their employment with plaintiff. In this, they violated the rule of the Restatement and the law of all jurisdictions that have had occasion to pass on this question.

The only other case as far as is known to ever reach a court of last resort concerning the identical situation presented to the court in the case at bar is the case of *Duane Jones Company, Inc. vs. Burke et al,* 117 N.E. 2d 237 (New York) (1954). It had before it the case wherein the plaintiff adver-

tising agency brought action against certain of its former officers and employees and against a new advertising agency formed by them for damages arising out of the plaintiff's loss of business which business had been pre-empted by the former officers when they left the agency. The Duane Jones Advertising Agency was organized in 1942 by Mr. Jones who was an experienced advertising executive and was its majority stockholder. By 1951 the agency had acquired accounts in such number and quality as produced a gross billing of $9,000,000.00. Then in 1951 the agency lost three of its accounts with a total annual billing of $6,500,000.00 and certain of the executives and staff members had resigned from the organization. In June of 1951 a meeting was called by a number of plaintiff's officers and directors and employees wherein Mr. Jones was told that he should either sell his interest in plaintiff corporation or the personnel involved would resign en masse and form a new agency. He was also advised that the agency's customers had been "already pre-sold" on the idea of joining a new agency. Negotiations for the sale of Mr. Jones' stock did not materialize and in August and September of 1951, a number of the officers and employes of the plaintiff corporation left and joined the new agency which was a corporation they had recently formed. Prior to leaving, they solicited and obtained a substantial number of plaintiff's customers and shortly after the new corporation

was organized, it was servicing the advertising business of these customers.

Plaintiff filed the action seeking damages from the defendants sustained as a result of a conspiracy by them to deprive plaintiff of its principal customers and certain of its key employees. Many of the rulings of the New York Court are applicable to this case concerning all points raised by the appellants in the case at bar including solicitation, proximate cause, and damages. Respondent cites the following pertinent observations of the New York Court:

> "The foregoing evidence has led us to conclude that the conduct of the individual defendants-appellants as officers, directors or employees of the plaintiff corporation '* * * fell below the standard required by the law of one acting as an agent or employee of another.' *Lamdin vs. Broadway Surface Adv. Corp.*, 272 N. Y. 133, 138, 5 N.E. 2d 66, 67. Each of these defendants was '* * * prohibited from acting in any manner inconsistent with his agency or trust and [was] at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.' 272 N.Y. at Page 138, 5 N.E. 2d at Page 67. Plaintiff's evidence — which the jury apparently believed — established that on June 28, 1951, the individual defendants-appellants met and agreed to take over the business of the plaintiff agency, either by purchase of the controlling interest in the corporation or by resignation en masse and the formation of a new agency; that at that meeting it was pro-

posed that the defendants contact plaintiff's customers whose advertising accounts were then being serviced by the defendants as account executives of plaintiff, with reference to prospective control of plaintiff's business by the individual defendants; that on July 3rd the employee-defendants offered to purchase, at a fixed price, the controlling interest in plaintiff agency and stated that, if the offer were not accepted, they would resign and that plaintiff's customers had been 'presold' on the proposed action; that a day or two after termination of unsuccessful negotiation for their purchase of the stock, the defendants who were officers and directors submitted to plaintiff their resignations from those positions, all (save one) of which resignations were received by plaintiff on the same day and were in substantially identical form; that three of the individual defendants immediately commenced negotiations leading to the incorporation of August 23rd of a rival advertising agency which agency commenced operations on September 10th; that on or about the time it commenced business, the defendant agency had as its customers nine accounts formerly serviced by plaintiff and employed more than 50 per cent of plaintiff's personnel; that the accounts and personnel were acquired through solicitation by, or at the direction of, the individual defendants prior to or during the period when they were completing their duties as employees of plaintiff; and finally, that the rival agency was formed and the accounts and personnel were solicited without disclosure of such activities to plaintiff.

"The inferences reasonably to be drawn from

> the record justify the conclusion — reached by the jury and a majority of the Appellate Division — that the individual defendants-appellants, while employees of plaintiff corporation determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves through destruction of plaintiff's business, in violation of the fiduciary duties of good faith and fair dealing imposed on defendants by their close relationship with plaintiff corporation. The jury's determination of those questions of fact — affirmed by the Appellate Division — is beyond our power to disturb. 'If conflicting inferences are possible as to abuse or opportunity, the trier of the facts must make the choice between them. There can be no revision in this court unless the choice is clearly wrong.' *Meinhard vs. Salmon*, 249 N.Y. 458, 467, 164 N.E. 545, 548, 62 A.L.R. 1."

A $300,000.00 verdict in favor of plaintiff against defendants was affirmed on appeal.

Applicable, also is the fact in the *Duane Jones'* case at least one of the accounts was solicited after the defendants terminated their employ.

POINT II.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE LOWER COURT'S FINDING THAT THE DEFENDANT HIGGINS PARTICIPATED IN THE COMMISSION OF THE TORT AGAINST PLAINTIFF.

The lower court found that Mr. Higgins assisted Mr. Hall in the solicitation of the plaintiff's customers and was equally liable to plaintiff corporation.

In his Brief, defendant Higgins charges that there is not sufficient evidence to show that he acted in concert with Mr. Hall for the solicitation of plaintiff's customers and, therefore, that he is innocent and that the liability, if any, in this case belonged to defendant Hall.

While the conduct of defendant Higgins is not as flagrant in this case as that of defendant Hall, it is nonetheless tortious and he is jointly responsible with defendant Hall.

He first of all concedes that during the week of February 17, 1964 he visited Mr. Peter Wilson of Wilson Transport Supply and assisted Mr. Hall in the solicitation of that account (R. 217). Important to his liability is the fact that he then knew that Mr. Hall had contacted the other accounts and knew that they were coming with him and he and Mr. Hall had also by that time (February 19) discussed the formation of a new advertising agency in which he would participate. Before each had terminated his employment with the plaintiff corporation, the corporation of Higgins & Hall had been formed and was in business on March 1, 1964.

The evidence further shows according to the testimony of Mr. Hoggan that the attempted destruction of the plaintiff corporation was a joint affair on behalf of both Mr. Hall and Mr. Higgins. Mr. Hoggan testified:

"A. It was a very short meeting. Mr. Hig-

> gins announced that Mr. Hall was leaving. I expressed my regrets and I said: 'What abount the accounts?' He said: 'We have those all locked in.' " (R. 241) . . . "Then Mr. Higgins said: 'Why don't you face it Ned. You have had it.' He said: 'We have all the business and all you have left is this bunch of old furniture downstairs and some money in the bank.' He said: 'Why don't you be a good guy and buy Nels out and release him? We'll be on our way and we'll bear you no hard feelings at all.' "

Mr. Higgins never denied that these statements were made by him to Mr. Hoggan and, of course, it showed without question a joint action or agreement on the part of the two defendants. No other connotation can be put on the word "we" when Mr. Higgins states, "We have the accounts locked in." And "We have the business."

The rule is set forth in 16 Am. Jur. 2d Conspiracy, Section 48:

> "JOINT AND SEVERAL LIABILITY. Each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of law, an act for which each is jointly and severally liable. This joint and several liability of a conspirator applies to damages accruing prior to his joining the conspiracy as well as damages thereafter resulting, and regardless of whether he took a prominent or an inconspicuous part in the execution of the conspiracy. This liability of each member of a conspiracy for the damage resulting there-

> from exists whether or not the conspirator profited from the result of the conspiracy. Before a person who joins an existing conspiracy will be held liable for what was previously done pursuant to the conspiracy, however, it must be shown that he joined the conspiracy with knowledge of the unlawfulness of its object or of the means contemplated. And a conspirator who withdraws from a conspiracy is not responsible for subsequent acts committed by his former confederates."

The above rule illustrates the principle that one joining the conspiracy is liable for damages accruing prior to the time that he joined if it is shown that he joined with knowledge of the unlawfulness of its object or the means contemplated to accomplish the objective. Mr. Higgins is legally charged with the knowledge that his duty to his corporation, the plaintiff, was that of a fiduciary and the attempted destruction of the corporation by he and Mr. Hall was unlawful.

A case in point is *DeVries vs. Brumback,* 349 P. 2d 532 (Cal.). This was an action on conversion against defendant who obtained some jewelry that had been stolen from the plaintiff. This defendant did not join in the conspiracy until some time after the robbery had been committed, but he did know of the robbery and took into his possession the greater part of the stolen property. Defendant argued that he could not be responsible for the full amount because the full amount had not come into his possession. The Court notes the distinction between the

crime of conspiracy and the tort of conspiracy holding:

> "Here the findings established that appellant, within a few hours after the robbery, joined the continuing conspiracy to convert and with full knowledge of the prior acts of his co-conspirators, actively participated in the overall purpose to convert all of the stolen property to their use and benefit. As such act of participant, appellant was a joint tort feasor liable for the entire damage done in pursuance of the common design. In such circumstances, the question of whether or not all or part of the unrecovered stolen property ever came into appellant's personal possession is immaterial."

It would have been otherwise in a criminal case wherein a person could not have been held responsible for those acts committed to the time he joined the conspiracy.

On the above facts and law defendant Higgins is fully liable to plaintiff.

POINT III.

THE LOSS SUSTAINED BY PLAINTIFF WAS CAUSED BY DEFENDANTS' CONDUCT AND THE COURT PROPERLY AWARDED DAMAGES THEREFOR.

Defendants argue under their Point III that no loss was caused to plaintiff by their wrongful conduct because the accounts in question would have left plaintiff anyway; and their conduct could not, then be the proximate cause of loss.

The fallacy of this argument may be demonstrated by analogy. Assume a person afflicted with a fatal disease. Assume also that this person is killed by the wrongful act of a third person. Could that third person successfully argue that he could avoid the payment of damages because the dead person was not going to live much longer anyway? Would a person be any less guilty of murder if his victim was afflicted with a fatal illness?

But further, consideration of the evidence and inferences to be drawn therefrom will show that causation is not the problem in this case that defendants would have the court believe.

Mr. Hall testified that he did not need the business of these accounts because he was free to leave the plaintiff any time he chose and that he possessed skills that he could sell in the market place at any time (R. 120, 121).

Mr. Higgins testified that he welcomed Mr. Hall as an associate whether he brought any business or not (R. 214).

Why then, was it necessary for these two gentlemen to solicit the advertising business of these accounts? The reason, of course, is that they were not at all sure that this business would automatically follow their departure and it was necessary for Mr. Hall to exercise the advertising skills he possessed to make sure that when he left he would have the business "locked in". As noted above he did this by taking

full advantage of the intimate association he had with the client and by casting the impression that plaintiff was in dire financial straits; and that he and Mr. Hogan were splitting up. This disparity of image created by Mr. Hall made the decision of the client to go with him easily predictable.

Had these defendants possesed even the most primitive sense of business ethics and had they observed even the most rudimentary rules of the fiduciary relation legally imposed upon them as directors of plaintiff corporation this lawsuit would not have resulted. They would have informed Mr. Hoggan of their decision to leave and the subject of the accounts would have naturally arisen. Plaintiff would then have had the opportunity to present to the client evidence of its financial ability, continuity of service and new advertising ideas and programs. Mr. Hall would have the same opportunity. Under these circumstances the client could have made an intelligent choice, and an actionable wrong would not have been committed.

Under the proper circumstances outlined above we do not know what the clients would have done. This point is illustrated by the testimony of Mr. Wilson of Wilson Transport Supply.

> "Q. What difference would it have made in your decision, had he not held any discussion with you in respect to this matter at all?
>
> "A. Well, that is a difficult question. If he

> hadn't had any discussion and had left the agency, I'm not too sure whether he would have continued to or whether he wouldn't have. It's a difficult question to ask. I mean to answer." (R. 289)

Mr. Wilson is referring to whether he would have stayed with Mr. Hall absent solicitation.

Defendants cite with emphasis the case of *Nichols-Morris v. Morris*, 174 F. Supp. 691, S.D.N.Y. in support of their theory on causation. Plaintiff cites the case with equal emphasis. The court found in that case that defendant solicited the business of Nichols-Miller a customer of the plaintiff corporation, while defendant was still an officer and director of plaintiff. It further found that the business of this customer was cancellable and would undoubtedly be cancelled and awarded to defendant when he terminated his employment without any inducement on his part. Nonetheless, the court found that defendant had breached his duty toward plaintiff and awarded plaintiff judgment in the amount of $22,500.00. Had the court followed the novel theory advanced by defendant in this case, the court could not have awarded damages because the loss was not proximately caused by defendant's wrongful conduct.

A case of greater import is again that of *Duane Jones Co., Inc. v. Burke, et al.* (supra). As to causation the court held:

"Defendants-appellants also urge as a basis

for reversal of the judgment rendered against them, that plaintiff failed sufficiently to establish a causal relationship between damages sustained by plaintiff and the alleged wrongful conduct by the defendants. For this argument defendants rely upon (1) The fact that none of the accounts were under contract to plaintiff agency, and (2) The fact that there is evidence of record from which it may inferred that plaintiff had "resigned" all of its accounts in August, 1951, prior to the solicitation of such accounts by the individual defendants. Plaintiff was not required to show interference by defendants with existing contractual relationships in order to impose liability in the present action. (Citing cases). As was said in Keviczky v. Lorber, 290 N.Y. 297, 306, 49 N.E.2d 146, 150, 146 A.L.R. 1410: 'An injury to a person's business by procuring others not to deal with him or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong.' 2 Cooley on Torts Sec. 230. Moreover, there is evidence of record from which the jury might have inferred that the loss of customers suffered by plaintiff in August and September, 1951, was the direct result of defendants-appellants' activities immediately prior thereto. Plaintiff introduced evidence of the customers it had serviced for varying periods of time prior to June 28, 1951, and which it was then servicing; it established activities by defendants as to demands made upon plaintiff to surrender the business to defendants, accompanied by threats of mass resignation pursuant to a scheme reputed to have been 'pre-

sold' to the customers; it proved solicitation by defendants of plaintiff's accounts and personnel, and, finally, it established a mass exodus to the corporate defendant of plaintiff's customers and a majority of its key personnel. Upon that state of the record, the jury was entitled to find that plaintiff's losses were a proximate result of defendants' conduct."

The evidence in this record closely parallels that of the *Duane Jones* case and compels the same result.

POINT IV.

THE DAMAGES AWARDED TO PLAINTIFF WERE BASED UPON CORRECT PRINCIPLES OF LAW.

Appellants argue (1) That the gross receipts of the advertising accounts and Hall's present salary are not proper elements of damage, and (2) Plaintiff suffered no loss of profits and, therefore, suffered no damage.

Defendants argue at length by reference to the financial statements of the plaintiff that the accounts in question would not have produced any profit for plaintiff. However, Mr. Hall was receiving a salary of $1,100.00 a month while in plaintiff's employ and all of their accounting is based on that salary. This is basic to their premise and it is faulty. Had the accounts remained with the plaintiff, they could have been serviced by less expensive help or by the remaining principal, Mr. Hoggan Defendants' argument must fail for another reason, namely that they argue that in addition to Mr.

Hall's salary of $1,100.00 a month, there must be added $8,118.00 for overhead and the combination of these two figures is greater than the gross revenue produced by the accounts for the year 1963. There is no evidence as to which portion of the overhead is applicable to these accounts. Defendants have simply attempted to spread the overhead pro-rata and obviously this cannot be done in any business without a detailed cost accounting.

In considering the elements of damage in this case the court should be mindful that although defendants Higgins and Hall were employees of plaintiff and subject to the duties legally flowing from that relationship they owe to plaintiff the higher duty of that of a fiduciary because they were both officers and directors of plaintiff corporation. They owed the utmost loyalty, fairness and good faith in their dealings with plaintiff and its business. They became dissatisfied with their association with plaintiff, but rather than express this in a legally acceptable fashion, they chose a path calculated to cripple if not destroy the plaintiff by seizing its business for themselves.

When it comes to affixing damages for such a wrong must the court look only to whether plaintiff suffered a loss of profits (net) as suggested by defendants? The answer is no. It is a matter of common knowledge that small closely held corporations rarely if ever show a book profit. Their profits are customarily represented by the salaries drawn by the principal officers and directors.

If this court were to look solely to the element of loss of net profits in a case such as this where a director sets out to cripple his own corporation, then the wrong would be acknowledged but the wrongdoer would escape unscathed by the payment of nominal damages. The terms loyalty, fair dealing and good faith as applied to a corporate director would lose all meaning except to legal scholars.

The courts have wisely adopted an approach designed to protect the corporation from its wrongdoing directors. The law looks not only to the loss sustained by the corporation, but looks with even more emphasis upon the gain and unjust enrichment attained by the wrongdoer.

Lutherland v. Dahlen, 53 A2d 143, (Pa.).

> "It should certainly be unnecessary to state once more in detail the principles of law and equity governing the duties owed to a corporation by its directors and officers, for those principles have been repeatedly enunciated. Suffice it to say that it is well settled; and indeed, is embodied in the statutory law of the Commonwealth, (Citing statute), that officers and directors are deemed to stand in a fiduciary relation to the corporation. They must devote themselves to the corporate affairs with a view to promote the common interest and not their own, and they cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage other than that enjoyed by their fellow shareholders. (Citing cases.) In short, there is demanded of the officer or director of a corpor-

> ation that he furnish to it his undivided loyalty; if there is presented to him an opportunity which is within the scope of its own activities and the present or potential advantage to it, the law will not permit him to seize the opportunity for himself; if he does so, the corporation may elect to claim all the benefits of the transaction. Nor is it material that his dealings may not have caused a loss or been harmful to the corporation; the test of his liability is whether he has unjutly gained enrichment."

See also *Craig v. Graphic Arts Studio, Inc.*, 166 A2d 444 (Del.) For a leading California case *Hall v. Dekker*, 115 P2d 15 (Cal.)

In this case the business involved was the wholesale floral business. Hall commenced the business in 1930. In 1930 Dekker was employed to manage the Los Angeles branch. In September 1931, he became a partner. In November 1934 the business was incorporated and defendant Dekker received stock and was elected vice president of the corporation. He remained an officer and director through January 1938. On that date while still an officer and director of plaintiff another corporation was organized by former employees of the plaintiff and the new corporation was promoted, and financed by defendant Dekker. He solicited business for the new competitor and obtained orders from plaintiff's customers. Defendants contended on appeal that this evidence did not state a cause of action against them. The court held:

"This proposition is untenable . . . It is the established law that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. (Citing cases). Vice Chancellor Leaming thus accurately states the rule in Hussong Dyeing Machine Co. v. Morris, supra, at page 250 of 89 Atlantic, 'It was not lawfully possible for the defendant while a director and treasurer of complainant corporation to enter into an opposition business in his own behalf of such a nature that it would cripple or injure the corporation he represented."

This case was followed in a later California case of *Cavanaugh Nailing Machine Co. v. Cavanaugh*, 334 P2d 954 (Cal.)

A further statement of the rule is contained in *Guth v. Loft, Inc.*, 5 A2d 503 (Del.)

"If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefits and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation extinguishes all possibility flowing from a breach of the confidence imposed by the fiduciary relation. Given the

> relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty."

With this principle in mind plaintiff's approach to the question of damage is from two standpoints: (1) The value of an advertising account to an agency and (2) The revenue derived and expected from the accounts taken plus the gain to defendants and the likelihood that it would continue.

Mr. Alfred H. Garrigues, a prominent Salt Lake City advertising executive testified on plaintiff's behalf concerning the value of an account. He had had recent occasion to value the accounts in his business when it was changed from a partnership to a corporation. His experience was gained with his agency management and a great deal of reference material (R. 182). For his purposes he assumed an account that had gross annual billing of $100,000.00. Customarily an agency would derive 15% commission or $15,000.00 gross revenue from that account. (Note: The evidence showed that the accounts produced $15,709.74 gross revenue in 1964 and $17,272.35 in 1963. These figures are roughly equivalent to those used by Mr. Garrigues.) He first considered that an account would carry with it an acquisition cost. By this he meant the time spent in contacting the account and doing the research and preparation of material necessary to make a presentation to the client.

Mr. Garrigues testified that in his experience he would assign a minimum cost of 5 per cent of the annual billing of an account to acquisition cost (R. 183). Assuming, therefore, an annual billing for the account of $100,000.00, a minimum acquisition cost would be $5,000.00.

Mr. Garrigues next considered that another factor in evaluating an account was the indoctrination cost (R. 190). This was time spent after the initiation of the account necessary to get the account off the ground before it became a paying proposition. He did not assign any monetary value to a specific account involving an annual billing of $100,000.00, but nonetheless considered this a valuation problem because it represented an unrecovered cost to the agency (R. 191).

Mr. Garrigues concluded by testifying that a third and most important factor is that the account would have a value in addition to the acquisition and indoctrination cost of between one month's gross billing and one year's gross revenue. Using an account billing $100,000.00 per year, that account would have an annual revenue at the customary 15 per cent commission of $15,000.00 and that account would have an average monthly billing of between $8,000.00 and $9,000.00. Mr. Garrigues would value such an account to his agency of $20,000.00 combining the factors of valuation, acquisition, and indoctrination (R. 192-193).

The accounts taken by defendants from the plaintiff actually had produced during 1963 the sum of $17,272.35 and in 1964, the year that they were taken from plaintiff, the sum of $15,709.74. There is also before the Court the evidence of Mr. Hoggan that the total advertising business done by a client is most likely to increase over the years. (R. 247)

We turn now to the enrichment or gain enjoyed by Mr. Higgins and Mr. Hall from the accounts solicited. It should be noted that all of the acquisition and indoctrination costs that were part of these accounts had already been absorbed by the plaintiff and there would be no transitional costs because Mr. Hall was already familiar with the accounts as he had done their advertising in the past. This is, of course, a benefit to defendants. We also note that at the time this action was tried in January of 1965, approximately 11 months after Mr. Hall left the employ of the plaintiff, he was drawing a salary from the corporation of Higgins & Hall of $1,250.00 per month. Necessarily, a good part of that salary, if not all of it, would be derived from the work he was doing for the accounts that he took from plaintiff (Ex. 3p) & (Ex. 9p).

The lower court would also have considered a likelihood of the accounts remaining with defendants for some future time. At the time of the trial in January, 1965, the accounts had been with the defendants for approximately 1 year and each of

the accounts expressed a desire and willingness that their business stay with the defendants. It is true that no one can predict the future, but at least it appears from all of the available evidence that the gain to defendants in this case would be a continuing one and, of course, a continuing loss to the plaintiff.

Again we refer to the *Duane Jones* case, supra, wherein it is stated:

> "If plaintiff established wrongful conduct by defendants as alleged in the Amended Complaint — and the jury found that it did — it was entitled to recover as damages the amount of loss sustained by it, including opportunities for profit on the accounts diverted from it through the defendant's conduct (Citing cases.) Under the facts here presented, plaintiff's loss was a continuing one extending at least up to the date of trial. It is no answer that the amount of profit plaintiff would have made cannot be definitely established by proof at the trial. 'There is no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any branch of the cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when from the nature of the case the damages cannot be estimated by certainty, or only a part of them can be so estimated, no objection is perceived placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate

estimate which the nature of the case will permit. (1 Southern on Damages [4th Edition 1916] Section 70).' "

In the case of *Gould vs. Mountain States Telephone and Telegraph Company*, 6 Utah, Utah second 187, 309 P. 2d 802, this Court stated:

> "The rule against recovery of uncertain damages is generally directed against uncertainty with respect to cause rather than to measure or extent, so that a party who has broken his contract will not ordinarily be permitted to escape liability because of uncertainty in the amount of damages resulting, and the fact that the full extent of damages for breach of contract must be a matter of speculation, it is not a ground for refusing all damages."

There was no evidence in the *Duane Jones* case (supra) that the damages awarded by the jury were based upon loss of net profits from the accounts. On the contrary, it appears from a reading of that case that the damages were assessed on the basis of overall loss to the corporation and gain to the defendants by reason of their conspiracy to injure the plaintiff corporation and benefit therefrom. The fact that the jury verdict was in the even amount of $300,000.00 would be indicative of this.

Plaintiff again states that the measure of damages in a case such as this is not especially the loss to the plaintiff corporation, but rather the gain and enrichment to defendants. They now have business which produced for them gross revenues of over $15,000.00 in 1964 and it was reasonable for the

Court to conclude that they would enjoy these benefits in the future. the judgment of $25,000.00 awarded to plaintif based upon these elements is therefore reasonable and proper. As with other factual issues, the amount of damages is within the province of the trier of fact and should not be disturbed on appeal.

POINT V.

THE COURT DID MAKE FINDINGS OF FACT ON ALL MATERIAL ISSUES IN THE CASE.

The issues before the trial court as set forth in the Pre-trial Order were:

1. Was there a conspiracy between Higgins & Hall, while still in the employment of plaintiff?

2. If there was a conspiracy, did the defendants solicit the plaintiff's accounts while still in the employ of plaintiff?

3. If it is determined that the defendants did acquire and solicit, what is the plaintiff's damage?

4. Further, is the plaintiff entitled to a permanent injunction against the defendants? (Plaintiff did not seek further injunctive relief at the trial.)

In addition, defendants claimed that damages, if any, were not the proximate result of any wrongful conduct on their part (R. 18).

Without setting forth verbatim the Findings and Conclusions of the lower court, it is sufficient

to say that the court fully answered each of the issues posed in the Pre-Trial Order and concluded that plaintiff was damaged by the wrongful conduct of the defendants. These Findings implicitly cover the questions presented in defendants' Brief as to damage and proximate cause and, therefore, defendants' criticism of the lower court's findings is not meritorious.

CONCLUSION

So far as can be ascertained, this case involving wrongful solicitation by an account executive of an advertising agency is only the second case of its kind ever to reach a court of last resort in this country. (The *Duane Jones* case (supra) was the first.) The decision of the Court in this case will be far reaching in the advertising industry.

The critical events in this law suit occurred between February 13 and February 18, 1964. Mr. Hall and Mr. Higgins, both officers and directors of the plaintiff corporation, had expressed dissatisfaction with their association with plaintiff. Mr. Higgins elected to terminate and so expressed himself to Mr. Hoggan, the remaining principal in the corporation on February 13, 1964. Mr. Hall at that time was undecided. At that time also both defendants were informed that the accounts then being serviced by Mr. Hall were not his, but belonged to the corporation. Thereafter without informing anyone, on February 17, 1964 Mr. Hall directly solicited

the advertising business of the accounts he had serviced and these accounts transferred their allegiance to him. (Salt Lake Mattress Company which had first agreed to go, later decided otherwise). When Mr. Hall had obtained these accounts, he announced his decision to leave the plaintiff. Thereafter both Mr. Higgins and Mr. Hall solicited the Wilson Transport Supply account and later in February, they formed a new corporation entitled Higgins & Hall and this corporation was in business March 1, 1964. On February 29, 1964, both defendants entered the offices of the plaintiff and removed all the files and records pertaining to these accounts. Still later in April of 1964 while defendants were under a Court Restraint, Mr. Hall cancelled a 13-week KSL-TV contract of plaintiff which he had negotiated in February and transferred it to Higgins & Hall.

These acts: Solicitation of plaintiff's customers; removing plaintiff's files and records; and interferring with the plaintiff's contracts constituted a clear violation of the fiduciary duties imposed upon defendants as officers and directors of plaintiff and were in the very least an attempt to cripple or destroy the plaintiff. The lower court so found and indeed a contrary finding would be totally unwarranted by the evidence.

The measure of damages in this case is both the loss to the plaintiff and the gain and enrichment of defendants. During 1964 these accounts produc-

ed a gross revenue of over $15,000.00. The judgment of the Court awarding $25,000.00 in damages to plaintiff is less than two years revenue from these accounts and the Court also had before it the further evidence that defendants were likely to enjoy the benefits of this business in the future. Clearly the defendants in this case were enriched to that extent.

The judgment of the lower court must be affirmed.

Respectfully submitted,

HANSON & GARRETT
520 Continental Bank Building
Salt Lake City, Utah
Attorneys for
Plaintiff and Respondent